

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 23

Selected Issues Regarding Imposition of Adult Sentence

23.1 Applicable Court Rule and Legislative Sentencing Guidelines

Insert the following text after the first full paragraph on page 470:

In *People v Babcock (Babcock III)*, ___ Mich ___ (2003), the Michigan Supreme Court issued its first comprehensive interpretation of the legislative sentencing guidelines. In *Babcock*, the trial court made a downward departure from the sentencing guidelines. The prosecutor appealed, and in *People v Babcock (Babcock II)*, 250 Mich App 463 (2002), the Court of Appeals affirmed the sentence indicating that although some factors cited by the trial court were not objective and verifiable, the trial court did not abuse its discretion by departing from the guidelines. The prosecutor filed an application for leave to appeal. The Supreme Court granted leave and concluded*:

“[T]he Court of Appeals concluded that some of the reasons articulated by the trial court were not objective and verifiable. As explained above, if a reason is not objective and verifiable, it cannot constitute a substantial and compelling reason. As also explained above, if the trial court articulates multiple reasons, and the Court of Appeals, as in this case, determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, the Court must remand the case to the trial court for resentencing or rearticulation. Because the Court of Appeals in this case did not determine whether the trial court would have departed, and would have departed to the

*Justices Markman, Kelly, and Taylor signed the lead opinion. Chief Justice Corrigan concurred in part and dissented in part, as explained below, and Justice Young signed the Chief Justice’s opinion. Justice Cavanagh and Justice Weaver also concurred in part and dissented from the majority’s requirement that the factors allowing for departure be “objective and verifiable.”

same degree, absent consideration of the reasons that the Court of Appeals found to be not objective and verifiable, we reverse its judgment and remand this case to the Court of Appeals for further consideration.” [Footnotes omitted.] *Babcock III*, *supra* at ____.

*The Court of Appeals has stated that “[b]ecause a majority of the justices writing separately concurred with most of the lead opinion except one or two parts specifically stated in those separate opinions, we conclude that a majority of justices concurred with the appendix. Thus, the appendix is binding law.” *People v Lowery*, ____ Mich App ____, ____ n 3 (2003).

In order to assist the bench and bar, the Supreme Court included an appendix to the opinion.* The appendix summarizes the responsibilities of the trial court and the Court of Appeals under the statutory sentencing guidelines as follows:

“1. A trial court is required to choose a minimum sentence within the guidelines range, unless there is a substantial and compelling reason for departing from this range. MCL 769.34(2), (3).

“2. If a trial court’s sentence is within the guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant’s sentence. MCL 769.34(10).

“3. A substantial and compelling reason must be ‘objective and verifiable’; must “‘keenly’ or ‘irresistibly’ grab our attention”; and must be “of ‘considerable worth’ in deciding the length of a sentence.”” [*People v*] *Fields*, [448 Mich 58, 62, 67 (1995)].

“4. A trial court must articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies that departure. MCL 769.34(3); *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000).

“5. A trial court ‘shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.’ MCL 769.34(3)(b).

“6. In considering whether, and to what extent, to depart from the guidelines range, a trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range. MCL 769.34(3).

“7. In reviewing sentencing decisions, the Court of Appeals may not affirm a sentence on the basis that, although the trial court did not articulate a substantial and compelling reason for a departure, one nonetheless exists in the judgment of the Court of Appeals. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing. MCL 769.34(3); MCL 769.34(11).

“8. If a trial court articulates multiple ‘substantial and compelling’ reasons for a departure from the guidelines, and the Court of Appeals determines that some of these reasons are substantial and compelling and others are not, the panel must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the substantial and compelling reasons alone. MCL 769.34(3).

“9. If a trial court departs from the guidelines range, and its sentence is not based on a substantial and compelling reason to justify the *particular* departure, i.e., the sentence is not proportionate to the seriousness of the defendant’s conduct and his criminal history, the Court of Appeals must remand to the trial court for resentencing. MCL 769.34(11).

“10. “[T]he existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error.” *Babcock I*, [244 Mich App 64, 75-76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 77 (1995)].

“11. “The determination that a particular [sentencing] factor is objective and verifiable should be reviewed by the appellate court as a matter of law.” *Babcock I*, [244 Mich App 64, 76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 78 (1995)].

“12. “A trial court’s determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.” *Babcock I*, [244 Mich App 64, 76 (2000)], quoting [*People v*] *Fields*, [448 Mich 58, 78 (1995)]. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Id.* at ____.

Chief Justice Corrigan dissented from the majority’s requirement that the Court of Appeals remand a case to the trial court “if the trial court articulates multiple reasons [for departure], and the appellate court . . . determines that some of these reasons are substantial and compelling and some are not, and the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons . . .” *Babcock III, supra* at _____. This requirement may force the Court of Appeals to remand a large number of cases to the trial courts for resentencing or rearticulation. In an effort to mitigate the number of cases that would be remanded, Chief Justice Corrigan strongly urges that every trial judge add the following disclaimer to every judgment of sentence that departs from the guidelines:

“I am persuaded that the defendant should serve the sentence I have rendered and it is my intention that this

sentence be sustained if an appellate court determines that any of my rationales for departure survive review.” *Id.* at ____.